In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1195

WATERFRONT GUARD ASSOCIATION, LOCAL 1852, INDEPENDENT WATCHMEN'S ASSOCIATION OF THE PORT OF BALTIMORE, MARYLAND, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Petitioner (the "Guard Union") represents waterfront guards employed in the port of Baltimore, Maryland. The Guard Union was formed after enactment of the 1947 amendments to the National Labor Relations Act,[1] to provide separate representation for guard employees previously represented by the International Longshoremen's Association ("ILA") (Pet. 4-5). Both the Guard Union and ILA have collective bargaining agreements with the Steamship Trade Association of Baltimore,

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[1]Section 9(b)(3) of the Act, 29 U.S.C. 159, which was added in 1947, provides that the Board shall not determine that any unit is appropriate for collective bargaining "if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

Maryland ("the Association"), which acts as a multi-employer bargaining agent for its employer members (Pet. App. 4a; A. 12, 82, 268, 283).[2]

Amstar Corporation maintains a sugar refinery in Baltimore, Maryland (Pet. App. 4a; A. 243, 246). Most of its employees there are production and maintenance workers represented by the Amalgamated Meat Cutters and Butcher Workmen of North America (Pet. App. 4a-5a; A. 118). Amstar also employs some twenty longshoremen supplied by the ILA hiring hall to unload vessels carrying bulk sugar to its refinery (Pet. App. 7a; A. 82, 118). The longshoremen are covered by the Association's collective bargaining agreement with ILA (Pet. App. 5a, 7a; A. 82). Amstar joined the Association in 1937 (Pet. App. 7a; A. 81), before the Guard Union was formed (A. 193).

Since 1960, Amstar has contracted out the guard work at the refinery to Pinkerton, Inc. (Pet. App. 5a; A. 58-61, 116-117, 249-255), which employs about twelve guards there—eight or nine full time, and three or four part-time (Pet. App. 5a, 7a; A. 65). Pinkerton is the sole employer of the guards; it alone sets their wages and other terms and conditions of employment (A. 73-74). The Pinkerton guards have not chosen the Guard Union or any other labor organization to represent them, and the Guard Union has never claimed to have their majority support or asked Pinkerton to sign a collective bargaining agreement covering them (Pet. App. 6a-7a, 9a-10a; A. 63-64, 87-88, 122-123, 127-128).

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[2] "Pet. App." refers to the appendix to the petition. "A." refers to the appendix to the briefs in the court of appeals.

In February 1972, following the election of new officers, the Guard Union sought for the first time to apply to Amstar its contract with the Association (Pet. App. 7a; A. 123-124, 200, 293-294). The Guard Union filed a grievance with the Association alleging that Amstar was violating the union security clause of the contract by employing guards who were not union members (Pet. App. 7a-8a; A. 88-89, 259).[3] Thereafter, the Guard Union required Amstar to arbitrate the question whether the contract applied to the guard employees (Pet. App. 8a, 18a-32a). The arbitrator upheld the Guard Union's grievance and ruled that all guards employed at Amstar's Baltimore refinery "must become and remain members" of the Guard Union (Pet. App. 8a, 33a). The Guard Union requested Amstar to comply with the award, adding that Amstar could keep the guards it had if it required them to join the Guard Union (Pet. App. 9a; A. 97, 107-108, 110, 137-138).

Amstar filed with the Board unfair labor practice charges against the Guard Union, and the latter, in turn, sued to enforce the award. On September 14, 1973, the district court denied Amstar's motion to dismiss or for summary judgment in the Guard Union's suit. *Local 1852, Waterfront Guard Ass'n* v. *Amstar Corp.*, 363 F. Supp. 1026 (D. Md.). Since the Board had not yet issued a decision on the unfair labor practice charges, the court found that enforcement of the arbitration award would not necessarily conflict with the result that the Board might ultimately reach. *Id.* at 1034. Following issuance of the Board's decision and order described below, the district court stayed further court action pending final judicial review of the Board's order (Amstar Br. in Opp. App. 2a-3a).

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[3]The union security clause required covered employees to become members of the Guard Union on or after the 30th day of their employment or the effective date of the contract, whichever was later (A. 269).

2. On March 8, 1974, the Board found that the Guard Union had violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. 158(b)(1)(A), (2), by demanding that Amstar recognize the Union as the bargaining representative of the guards employed by Pinkerton when they had never authorized the Guard Union to represent them, and by seeking to require that, as a condition of their employment, the guards become union members under the union security clause of the Association's agreement with the Union (Pet. App. 10a-11a, 15a-16a). The Board ordered the Guard Union to cease and desist from demanding that Pinkerton, Amstar, or the Association enter into a collective bargaining agreement covering Pinkerton's guard employees at the Amstar refinery, unless the guards select the Union as their collective bargaining representative in a Board-conducted election or by some other valid means (Pet. App. 16a). The court of appeals enforced the Board's order (Pet. App. 1a), holding that there was substantial evidence to support the Board's findings, and that the Board was not required to defer to the award of the arbitrator.

3. Contrary to petitioner's contention (Pet. 6-10), there is no conflict between the Board's decision here and such cases as *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, and *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 377-380, which accord great deference to the arbitral process in suits under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, to enforce labor contracts. Those decisions did not affect the Board's exclusive authority to adjudicate and remedy unfair labor practices under Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160. See *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432, 435-437. Although the Board may in its discretion elect to defer to arbitral processes, it is not compelled to do so (*National Labor Relations Board* v. *Strong*, 393 U.S. 357, 360-362), and if it elects to assert jurisdiction, its decision takes precedence over conflicting arbitral awards enforcing private contract rights (*Carey* v. *Westinghouse Elec. Corp.*, 375 U.S. 261, 272).

The Board reasonably exercised its discretion in declining to defer to the arbitrator's award in this case (Pet. App. 12a-13a). Since the Board is responsible for choosing an appropriate unit that will assure employees the fullest freedom of choice in selecting a statutory bargaining representative (Section 9(b) of the Act, 29 U.S.C. 159(b)), it may properly decide not to defer to arbitral awards that purport to determine whether the scope of the employee unit has been expanded through accretion under the contract. See *Combustion Eng'g, Inc.*, 195 NLRB 909, 911; *Hershey Foods Corp.*, 208 NLRB No. 70, enforced *sub nom. National Labor Relations Board* v. *Bakery & Confectionery Workers Int'l Union*, 506 F. 2d 1052 (C.A. 3). See also *Boire* v. *International Bhd. of Teamsters*, 479 F. 2d 778, 794-797 (C.A. 5). Cf. *Collyer Insulated Wire*, 192 NLRB 837.

Recognizing that the Board is not obliged to defer to the arbitrator's award, petitioner argues that the Board erred in determining that the award was not repugnant to the Act and thus misapplied its settled principles governing whether to defer to such an award (Pet. 8-10). See *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082. This case, however, offers no occasion for review of the Board's determination of repugnancy—which we think correct[4]—because the Board's general policy, as we have noted, is not to defer to arbitral determinations of unit issues.

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[4]The Board properly determined (Pet. App. 14a) that the arbitrator's award here was repugnant to the Act because its effect was to impose representation by the Guard Union on the Pinkerton employees, as a matter of contract, and to deprive them of their statutory right to make their own choice of bargaining representative. See *National Labor Relations Board* v. *Magnavox Co.*, 415 U.S. 322, 325-326; *Emporium Capwell Co.* v. *Western Addition Community Organization*, Nos. 73-696 and 73-830, February 18, 1975, slip op. 13, n. 14; *Sheraton-Kauai Corp.* v. *National Labor Relation Board*, 429 F. 2d 1352, 1357 (C.A. 9); *Local 1547, Int'l Bhd. of*

The Board also found other established requirements for deferral unsatisfied in that (1) Pinkerton, although a necessary party, was not given notice of or an opportunity to participate in the arbitration proceedings, and (2) the arbitrator never considered the questions whether Amstar had ever manifested an unequivocal intent to be bound by the Association's multi-employer agreement with the Guard Union or whether Amstar and Pinkerton could be considered joint employers under the Act (Pet. App. 14a). Petitioner does not challenge those findings.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

PETER G. NASH,
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National Labor Relations Board.

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Elec. Workers v. *Local 959, Teamsters*, 507 F. 2d 872, 877-878 (C.A. 9). "The parties cannot by contractual agreement divest the Board's function to operate in the public interest, and this is so regardless of whether the contractual agreement is reached by consent or through an arbitrator's construction." *Boire* v. *International Bhd. of Teamsters*, *supra*, 479 F. 2d at 803. In short, the Guard Union's effort to force itself upon the nonconsenting Pinkerton guards, in violation of Section 8(b)(1)(A) and (2) of the Act, is not made lawful merely because the Union successfully invoked arbitration in support of its unlawful aim.